

ARKANSAS SUPREME COURT

No. CR 08-154

JAMES BARNETT
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered December 19, 2008

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF UNION
COUNTY, CR 2005-707, HON.
HAMILTON H. SINGLETON, JUDGE]

MOTION DENIED.

PER CURIAM

In 2006, petitioner James Barnett was found guilty by a jury of second-degree sexual assault and was sentenced to eighty-four months' incarceration. Petitioner was represented at trial by his retained counsel, Gary McDonald.¹ No appeal was taken from the judgment of conviction entered on November 1, 2006, or the amended judgment entered on November 22, 2006. Petitioner then sought to proceed with a belated appeal pursuant to Arkansas Rule of Appellate Procedure—Criminal 2(e), which permits a belated appeal in a criminal case in some instances. He contended in the petition that he asked counsel to file an appeal from the judgment and counsel failed to do so.

It is the practice of this court when a pro se motion for belated appeal is filed in which the petitioner contends that he made a timely request to appeal, and the record does not contain an order relieving trial counsel, to request an affidavit from the trial attorney in response to the allegations in the motion. There was no order relieving Mr. McDonald in the record filed in this case. The affidavit requested of trial counsel was required because Arkansas Rule of Appellate Procedure—

¹The judgment and amended judgment entered in this matter incorrectly listed another attorney as petitioner's attorney of record.

Criminal 16 provides in pertinent part that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty-day period allowed for filing a notice of appeal under Arkansas Rule of Appellate Procedure–Criminal 2(a)(4). *Bankston v. State*, 354 Ark. 473, 125 S.W.3d 146 (2003) (per curiam).

Mr. McDonald stated in his affidavit that he thoroughly discussed whether to appeal with petitioner and petitioner decided not to appeal. He further stated that there was no communication between them after the decision was made.

As petitioner's and counsel's accounts of whether counsel was asked to appeal were in direct conflict and required findings of fact, we remanded the matter to the trial court for an evidentiary hearing on whether counsel was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal. *Barnett v. State*, CR 08-154 (Ark. Mar. 20, 2008) (per curiam). The findings and the transcript of the evidentiary hearing are now before us.

The court took testimony at the hearing from petitioner and Mr. McDonald. After hearing the testimony, the court concluded that Mr. McDonald's testimony that he was not asked to appeal from the judgment was more credible than the testimony of petitioner. As the merit of the motion for belated appeal rests entirely on the credibility of the witnesses, and this court recognizes that it is the lower court's task to assess the credibility of witnesses and resolve any conflicts of fact, we accept the trial court's findings. *Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002). The motion for belated appeal is denied.

Motion denied.